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No. 90-634

IN THE
Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY,
d/b/a Minneapolis Star and Tribune Company, and
NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT NORTHWEST PUBLICATIONS, INC. IN OPPOSITION TO PETITION

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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QUESTIONS PRESENTED

1. Whether the decision of the Minnesota Supreme Court that state contract law does not apply to promises of confidentiality extending from reporters to their sources raises any special and important issues of federal law that this Court should review.

2. Whether the Minnesota Supreme Court's opinion, as *dicta*, stating that First Amendment concerns would have defeated a claim for promissory estoppel under these facts raises any special and important issues of constitutional law that this Court should review, where the state court denied recovery on the claim as a matter of state law.

RULE 28.1 STATEMENT

Knight-Ridder, Inc. is the parent corporation of Respondent Northwest Publications, Inc. Respondent Northwest Publications, Inc. has no subsidiaries.

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The respondent, Northwest Publications, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's decision in this case.

REFERENCE TO OPINIONS

The June 19, 1987 Order and Memorandum of the Minnesota District Court dening respondents' Motion for Summary Judgment are not reported but are reproduced at Pages A-78 to A-88 of the Appendix to the petition.

The November 18, 1988 Order and Memorandum of the Minnesota District Court denying respondents' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New trial are not reported but are reproduced at pages A-61 to A-69 of the Appendix to the petition.

The opinion of the Minnesota Court of Appeals dated August 29, 1989 is reported at 445 N.W.2d 248 and is reproduced at pages A-19 to A-61 of the Appendix to the petition.

The opinion of the Minnesota Supreme Court dated July 20, 1990 is reported at 457 N.W.2d 199 and is reproduced at pages A-1 to A-18 of the Appendix to the petition.

STATEMENT OF THE CASE

Respondent does not contest the fact that on October 27, 1982, petitioner Dan Cohen (Cohen) elicited a promise from Bill Salisbury (Salisbury), a reporter for the St. Paul Pioneer Press Dispatch, a daily newspaper published by respondent Northwest Publications, Inc., (Pioneer Press Dispatch). Salisbury promised that Cohen's name would not be used in connection with any article describing unspecified information provided by Cohen concerning an unspecified candidate. Respondent does, however, wish to supplement petitioner's factual recitation.

Dan Cohen is a sophisticated political figure and operative. He has long been active in Minnesota Independent-Republican (I-R) politics. In 1960 he worked for Richard Nixon's presidential campaign and in 1964 was a paid campaign worker on the staff of the I-R candidate for the U.S. Senate, Wheelock Whitney (Tr. 275). Whitney was also the Republican gubernatorial candidate in 1982.

Cohen made his own bid for political office in 1965. He was elected to the Minneapolis City Council, a post he held until 1969. In 1967, Cohen was elected President of the Council. Cohen then ran for Mayor of Minneapolis in 1969, and was defeated in a close race. After holding several jobs, Cohen was defeated in his bid for a seat on the Minneapolis City Council in 1973. In 1982, only a few months before the pivotal events in this case, Cohen lost a primary bid for the I-R nomination for Hennepin County Commissioner (Tr. 276-80).

Throughout his political and business career Cohen dealt with the press on a regular basis, becoming very familiar with its workings (Tr. 277-78, 372-73). As an elected public official he offered information to reporters on a confidential basis, and he testified that he had offered information on that basis

even after he left the City Council (Tr. 372). Cohen was no stranger to the tactic of offering information concerning another candidate to a reporter on the condition that his name not be published (Tr. 372-73). As a public relations professional, Cohen interacted with members of the press on a regular basis (Tr. 281, 297-300).

Cohen also worked in the newspaper business, first as a freelance newspaper columnist, and later as a contributor of editorial articles in the Minneapolis Star. He became familiar with the workings of newspapers, and with the authority exercised by editors (Tr. 289-92).

Early in the morning of October 27, 1982, Cohen participated in a meeting held at the campaign headquarters of Wheelock Whitney, then the I-R candidate for governor. A participant testified that Cohen favored leaking to the press certain court records concerning Ms. Marlene Johnson, the Democratic-Farmer-Labor (DFL) candidate for Lieutenant Governor (Tr. 721). Cohen disclosed none of these facts to Salisbury.

The court records which Cohen supplied to Salisbury, and the extenuating circumstances of the arrests of Ms. Johnson, are set forth in the Supreme Court opinion. (A-4). During the course of that day, the newspapers continued to learn facts which had not been disclosed to the reporters by Cohen. The fact that Cohen was the source of the information regarding Ms. Johnson was common knowledge in the news media, and was available through other sources. (A-5). In fact, Cohen seemed proud of his efforts when he personally informed his employer of his actions (Tr. 1499). The Whitney campaign acknowledged that Cohen was the source of the documents, but insisted that the campaign had no involvement in publicizing the information (Tr. 1436-38).

Editors of the two newspapers faced several alternatives described in the Supreme Court opinion. (A-4-5). After carefully considering those alternatives, each newspaper independently decided to inform its readers that Cohen was the source of the potentially damaging information.

David Hall, then the executive editor of the Pioneer Press Dispatch, decided to move any reference to Cohen to the bottom third of the story. As Hall testified:

> I did feel like that even though I was insisting that the circumstances of the information be in the story, that I still believed that the—the primary newsworthiness was this case that had been disclosed, what the candidate and her running mate, now Governor Perpich, had to say about it, and later, toward the end of the story, putting the story in the context of how we received [the information from Cohen], laid this out in a straightforward and nonjudgmental manner. I think it lets voters decide for themselves about how to treat this.

(Tr. 1434-35). The article appeared in the October 28, 1982 edition of the Pioneer Press Dispatch. This lawsuit was filed later that year.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has not presented a certworthy question to the Court for its review. The Minnesota Supreme Court opinion rests solidly on its interpretation of Minnesota law. It decided as a matter of policy that Minnesota would not enforce promises extending from a reporter to a source. The court then analyzed the doctrine of promissory estoppel, as it has developed in Minnesota, and, in *dicta*, stated that, had petitioner alleged a claim for promissory estoppel, the particular facts of this case would not support such a claim. The court's decision, firmly grounded in its interpretation of this state's law, presents no certworthy issue.

Additionally, this case presents a highly unique set of facts which, according to the testimony presented at trial, had not previously occurred and is unlikely to reoccur. The court fashioned narrow rulings dependent on the particular facts of this case. These rulings do not conflict with this Court's prior decisions or the principles on which those decisions are based. There is no conflict between this decision and decisions of the courts of appeal or other state courts of last resort. The petition should be denied.

I. THIS CASE DOES NOT INVOLVE IMPORTANT ISSUES REQUIRING THIS COURT'S REVIEW.

Petitioner would have this Court believe that it must involve itself in this action because important issues of law will otherwise develop without direction. However, the importance of this decision from a legal standpoint is grossly exaggerated.

Petitioner cites newspaper and journal articles which refer to the pervasive use of confidential sources in news gathering

and the potential impact of this lawsuit on reporter-source relationships. Cohen Petition at 6-11. Petitioner speculates that the decision of the Minnesota Supreme Court may cause tensions in those relationships.

In fact, no witness who testified at the trial of this action could recall an incident similar to that about which petitioner complained. (A-5). Most of the professional journals cited by petitioner discuss the professional and ethical questions raised by the use of confidential sources, not the impact of the breach of the promise of confidentiality. *See e.g.* E. Abel, Leaking: Who Does It? Who Benefits? At What Cost? 62 (1987). Those newspaper and magazine articles which presume that legal questions may cloud the reporter-source relationship do so simply because this lawsuit was filed and because of the lower court rulings in this case, not because a general problem has developed. *See e.g.* Washington Post, July 21, 1990, at A3, col. 1. The same is true of the legal commentary which petitioner cites. *See* D. Gillmor & J. Barron, Mass Communication Law: Cases and Comment 394 (West Pub., 5th Ed. 1990).

The few cases petitioner cites are so disparate in their facts and legal theories that no general principle can be fashioned. The only case involving the specific questions raised here was one brought by petitioner's counsel after the jury verdict was entered in this action. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F.Supp. 1289 (D.Minn. 1990), *appeal pending*. The Minnesota Supreme Court applied Minnesota law to the peculiar facts of this case. Its ruling is meant to be narrow. As will be discussed below, the court was careful to limit the significance of its decision to the unique decision which faced the newspaper editors. Petitioner cannot point to any decision other than *Ruzicka* in which a court faced such circumstances. Even

Ruzicka highlights respondent's assertion that decisions of this nature are heavily influenced by the particular facts of each case. In that case, the court ruled that a purported promise of confidentiality was too ambiguous to be enforced. Thus, there is no evidence presented to support the claim that a *legal* controversy exists or will develop in the future.

Under these circumstances, if this Court accepted the petition it would only be involving itself in issues at yet ill-defined. Whether the questions raised in this case would ever rise to the level where supervision is necessary is wildly speculative.

II. THE DECISION OF THE MINNESOTA SUPREME COURT DISMISSING PETITIONER'S BREACH OF CONTRACT CLAIM CORRECTLY APPLIES MINNESOTA LAW, AND PRESENTS NO OTHER GROUND FOR THE GRANT OF CERTIORARI.

The Minnesota Supreme Court ruled in Part II of its opinion that the special relationship between a reporter and a source precludes the existence of a legally enforceable contract.[1] In doing so, the court grounded its decision on its interpretation of Minnesota contract law, and on its view of the public policy of this state. It is clear that such a ruling presents no certworthy issue.

Part II of the opinion addresses a relationship which is based on a moral commitment. The Minnesota Supreme Court

[1] It is unclear from the petition whether petitioner seeks review by this Court of Part II of the opinion below. Respondent's discussion presumes that petitioner disagrees with Part II. In Part I of its opinion, the Minnesota Supreme Court affirmed the decision of the Minnesota Court of Appeals that the trial court erred in failing to set aside petitioner's misrepresentation claim and punitive damage award. (A-6-7). Petitioner apparently does not challenge this ruling.

found that the breach of such a commitment, while it may be important to the parties, will not support an enforceable claim, since courts are unwilling to intrude on such relationships. *See Cruickshank v. Ellis*, 178 Minn. 103, 107, 226 N.W. 192, 194 (1929). The court viewed the relationship as ethical rather than legal.

> If the subject matter and terms are not such as customarily have affected legal relations, the transaction is not legally operative unless the expressions of the parties indicate an intention to make it so.

1 Corbin on Contracts §34, 138 (1963).

The court believed that the particular nature of such a relationship makes it exceedingly difficult to insure that an element essential to the formation of a valid contract, the meeting of the minds exists:

> The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent of unfolding developments; and none of the parties can safely predict the consequences of publication.

(A-9-10). Where the parties do not intend to form a contract, the court will not create one. *Linne v. Ronkainen*, 228 Minn. 316, 320, 37 N.W.2d 237, 239 (1949). *Cf. Johnson v. Blue Cross & Blue Shield of Minnesota*, 329 N.W.2d 49, 51 (Minn. 1983); *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980).

This ethical relationship supplies no certainty as to the intent of the parties. As a matter of public policy, the Minnesota

Supreme Court believed that it was inappropriate to "impose a contract theory' on a "special ethical relationship." (A-10). Based on its view of Minnesota law, the court chose to include this relationship with others upon which it does not wish to intrude. *See e.g.*, Minn. Stat. §553.01, *et seq.* (contracts to marry). Petitioner has failed to establish the existence of any ground which satisfies his burden under Supreme Court Rule 17.1.[2]

III. THE DECISION OF THE MINNESOTA SUPREME COURT REJECTING THE DOCTRINE OF PROMISSORY ESTOPPEL AS A GROUND FOR PETITIONER'S CLAIM IS BASED ON A PROPER CONSTRUCTION OF MINNESOTA LAW, FOLLOWS PRINCIPLES ESTABLISHED BY THIS COURT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS.

At no time during the pendency of this case did petitioner plead, assert or argue that his claim was based on the doctrine of promissory estoppel. Nonetheless, since the Minnesota Supreme Court ruled that Salisbury's promise of confidentiality did not constitute an enforceable contract under Minnesota law, in *dicta*, it analyzed the circumstances surrounding the promise and publication of petitioner's name in the context of the common law doctrine of promissory estoppel. In Part III of its opinion, the Minnesota Supreme Court correctly rejected this theory as well.

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[2] Despite Cohen's protestations to the contrary, the Contract Clause of the U.S. Constitution applies to legislative, not judicial, action. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). The three cases cited by Cohen involve legislative action. Thus, this basis for review must fail.

Under Minnesota law, the doctrine of promissory estoppel "implies a contract in law where none exists in fact." A promise not otherwise enforceable will be considered binding "if injustice can be avoided only by enforcing the promise." (A-10). The attractiveness of such a doctrine is that it provides "needed flexibility" in analyzing a particular event. *See Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740, 747 (Minn. 1983).

Clearly, then, an analysis of a promise under the doctrine of promissory estoppel will be inherently subjective. The doctrine calls for a facile judicial touch, since it is a "peculiarly equitable doctrine designed to deal with situations which, in total impact, necessarily call into play discretionary powers. . . ." Henderson, Promissory Estoppel & Traditional Contract Doctrine, 78 Yale L. J. 343, 379-80 (1969).

The Minnesota Supreme Court recognized the need to exercise such discretion in analyzing Salisbury's promise, since "the inquiry is into all the reasons why it [was] broken." (A-11). To the court, the facts of this particular case presented a transaction "fraught with moral ambiguity." In claiming moral superiority, petitioner relied on evidence of the strong ethical protection afforded the relationship of reporter and source, and on the damage he allegedly suffered as a result of the publication of his name.

Respondent pointed to the seamy aspects of petitioner's campaign "dirty trick" and to petitioner's attempt to manipulate the media. Respondent also presented evidence of the good faith attempt of its editors to resolve the ethical dilemma they faced. (A-4-5).

The court's analysis was affected by more than the morality of each side's actions, however. In examining the subjective events which would determine whether injustice would result

in this particular case from the failure to enforce the promise of confidentiality, the court also felt compelled to examine the editorial justifications for publishing petitioner's name.

> For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough?

(A-13). The court concluded that, in this case, justice required balancing free press rights against the "common law interest in protecting a promise of anonymity." [3]

The analysis of the promissory estoppel theory used by the Minnesota Supreme Court does not conflict with decisions of this Court. Clearly, *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) stands for the proposition that a state rule of law may not impose impermissible restrictions on free press rights. (A-12, n.6). State libel laws must reflect this constitutional interest. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, *reh. den.*, 467 U.S. 1267 (1984). Other causes of action are subject to First Amendment scrutiny. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (Intentional infliction of emotional distress); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (Invasion of privacy).

In attempting to answer the subjective questions raised by its analysis of Minnesota's promissory estoppel doctrine, the court recognized that it could not escape a review of the judg-

[3] From the inception of this case, respondent has argued that the courts cannot ignore First Amendment protection for the publication of truthful information on a political matter, and for the editorial decision to publish such information. Should this Court grant the petition for certiorari, respondent reserves the right to present such a question for its consideration, since this theory leads to the same outcome in this case.

ments made by respondent's editors. (A-13). The court would be required to decide whether it was appropriate to publish Cohen's name, knowing that his identity as the source of the information was known elsewhere. The court would have to confront the editors' concern that the voters should have this information prior to the election.

Such an exercise would conflict with this Court's view that the editorial process remain free from undue governmental restraint. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Given the facts of this case, the Minnesota Supreme Court did not believe that this was the rare circumstance where states should be allowed to punish the publication of truthful information. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The court was mindful of the particularly sensitive nature of an intrusion into political speech and political campaigns present in this case. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, *reh. den.*, 438 U.S. 907 (1978) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971).

At the same time, the court acknowledged that its task in viewing any claim in which conflicting constitutional interests are asserted is to balance those interests. It followed the lead of this Court, and refused to extend the existence of any rights beyond the "discrete factual context" of the case before it. *The Florida Star v. B.J.F.*, —— U.S. ——, ——, 109 S.Ct. 2603, 2607 (1989). The court did not create constitutional rights where none now exist. It merely applied established principles as a part of its analysis of the doctrine of promissory estoppel under Minnesota law. Its decision comports with the teachings of this Court.

Further, the other conflicts petitioner seeks to create do not exist. The opinion below does not conflict with this Court's pronouncement in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *Seattle Times* stands for the proposition that a litigant who obtains information only by virtue of court ordered discovery must comply with legitimate restrictions the court places on its use. The state's interest in providing access to information to allow the litigants to prepare for trial is clear. Similarly, the state has a strong interest in protecting classified data which is obtained by a former Central Intelligence Agency employee during his employment, when that employee has signed a written employment contract. *Snepp v. United States*, 444 U.S. 507 (1980).

The Minnesota Supreme Court, in *dicta*, opined that, given the facts of this case, Minnesota's interest in protecting a promise of anonymity did not outweigh the damage which might be done to First Amendment interests if the court enforced this promise of confidentiality using the common law doctrine of promissory estoppel. (A-13-14). Clearly, the state's interest here is weaker than in *Seattle Times* and *Snepp*. At the same time, the first amendment interests which flow from the political nature of this case, and which protect the editorial decisions made here, are stronger than the "background" shots taken of a prisoner in *Huskey v. National Broadcasting Co.*, 632 F.Supp. 1282 (N.D.Ill. 1986).

The opinion of the Minnesota Supreme Court is extremely narrow. Under the highly unusual facts of this case, the court refused to apply a flexible doctrine of state law. It determined that it must at least consider First Amendment principles this Court has promulgated when analyzing whether the doctrine of promissory estoppel should be used to give effect to an otherwise unenforceable promise of anonymity. Petitioner has not identified one decision which conflicts with this narrow ruling of state law.

CONCLUSION

This case presents a set of facts unprecedented in the experience of every journalist who testified at trial. Petitioner sought to mold the alleged wrongful breach of an ethical undertaking into an action for breach of contract and misrepresentation. Minnesota courts applied Minnesota law to petitioner's claims, and found them lacking. These rulings, grounded on correct interpretations of state law, present no certworthy issues.

The Minnesota Supreme Court held that Minnesota contract law does not apply to a reporter's promise of confidentiality to a source. The court also explored the question whether the facts of this case would support a claim based on the common law doctrine of promissory estoppel, even though such a claim was never advanced by petitioner.

The court performed the flexible analysis required by Minnesota law. It determined, in *dicta*, that it would not enforce respondent's promise under these particular circumstances. In arriving at this conclusion, the court favored respondent's right and responsibility to publish accurate information on important political issues over petitioner's right to enforce a promise of confidentiality.

This interpretation of the doctrine of promissory estoppel is narrow in scope. It does not conflict with decisions of this Court. There is no indication that the "discrete factual context" of this case will be repeated. The opinion of the Minne-

sota Supreme Court does not present a certworthy issue. This Court should deny Cohen's petition for certiorari.

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